



May 31, 2012

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: **Docket No. CFPB-2011-0039**

Dear Director Cordray:

Thank you for extending the comment period allowing people to reply to initial comments received pursuant to the “Streamlining Inherited Regulations” notice. Members of the American Land Title Association¹ serve as independent, third-party facilitators of real estate transactions. As part of these responsibilities, ALTA members prepare and provide to consumers the Uniform Settlement Statement (also known as the HUD-1) required by the Real Estate Settlement Procedures Act (RESPA), which discloses to consumers their final mortgage loan and settlement costs, including origination, closing, recording, tax and other charges associated with the transaction.

We are responding to statements made by Rhea Bratcher in her February 27, 2012, comment letter. Like Ms. Bratcher’s comments, we also believe that, “the RESPA rules in its current state have become extremely complicated and burdensome to comply with.” One aspect of the rule that is overly burdensome and in need of improvement are regulations surrounding average charge pricing (§ 3500.8(b)(2)). Attached is a white paper which outlines suggested improvements that would foster certainty and allow settlement service providers to use average charge pricing.

ALTA members look forward to continuing to work with the Bureau, and we thank you for your consideration of these important recommendations. If you have any questions about the recommendations in the attached white paper, please contact ALTA Vice President of Government Affairs Justin Ailes at 202-261-2937.

Sincerely,

Michelle Korsmo
Chief Executive Officer

¹ Founded in 1907, ALTA is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. With more than 8,000 office locations throughout the country, ALTA members operate in every county in the United States to search, review and insure land titles and conduct closings to protect the rights of home buyers and mortgage lenders who invest in real estate. ALTA members include title insurance companies, title agents, independent abstracters, title searchers and attorneys, ranging from small, one-county operations, to large national title insurers.

Improving RESPA's Average Charge to Benefit Consumers and Industry and Achieve its Regulatory Purpose

On December 5, 2011, the Bureau of Consumer Financial Protection published a request for information on streamlining inherited regulations.^[1] In the notice, the Bureau asks the public, "to identify provisions of the inherited regulations that the Bureau should make the highest priority for updating, modifying, or eliminating because they are outdated, unduly burdensome, or unnecessary."

One regulation that is ripe for modification are the regulations governing average charge pricing in the Real Estate Settlement Procedures Act ("RESPA") implementing regulations commonly called Regulation X. 24 CFR 3500.8(b)(2). When performing real estate settlement services, there are a number of instances where the provider cannot determine that actual cost of services performed by an outside contractor for a specific transaction in time to meet disclosure requirements under RESPA. Average charge allows a settlement service provider to charge consumers an average charge for a particular service performed by an outside contractor, rather than requiring them to match each contractor's specific invoice with each transaction. This benefits consumers by providing them more certainty that they are not being overcharged for third-party fees.

Below is a brief history of the development of average charge pricing under the recently promulgated RESPA rule and suggestions for increasing its use and benefits beyond its current limited adoption.

The RESPA Rule-Making Process

On March 14, 2008, the Department of Housing and Urban Development (HUD), issued a "Proposed Rule to Simplify the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs" (the "Proposed Rule")¹ for comment. Under one provision of the Proposed Rule, lenders that procured or who help consumers obtain third party settlement services, would be allowed to charge an average charge amount for those services procured from a third party provider. These charges might include credit report fees, appraisal fees, courier fees, flood certification fees, transfer tax fees, mortgage recordation fees or other third-party fees, so long as they are not based on the loan amount or property value. For example, average charge pricing could not be used for title insurance.

The Proposed Rule made clear that where average cost pricing was used, the evaluation of prices of third party services would focus on all of the loan originator's transactions together, rather than viewing each transaction separately.

HUD received several supportive comments on the use of an average charge for such third party settlement services obtained on behalf of consumers. Most notably, the comment of the Federal Trade Commission (FTC), as related by HUD, indicated:

FTC staff stated that it supports average cost pricing but recommended that HUD consider eliminating restrictions on how average costs may be calculated. FTC staff stated that it supports removing barriers to average cost pricing because there is "no economic justification for requiring that each consumer pay his or her unique marginal

^[1] Federal Register, Volume 76, No. 233, page 75825 (Streamlining Inherited Regulations). "This document asks the public to identify provisions of the inherited regulations that the Bureau should make the highest priority for updating, modifying, or eliminating because they are outdated, unduly burdensome, or unnecessary. ..It also seeks suggestions for practical measures to make complying with regulations easier."

¹ Federal Register, Volume 73, No. 51, Page 14030

cost of receiving settlement services and because doing so will likely result in lower prices for consumers.” FTC staff added that calculating and maintaining records of such individualized costs and prices adds additional accounting and recordkeeping costs to the transaction that are not required in other competitive markets. FTC staff asserted that by removing such costs, the market will be more efficient and the result will be lower prices for consumers.²

After receiving comments on average charge pricing as well as other provisions of the Proposed Rule, HUD published its Rule to Simplify the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs” (the “Final Rule”)³ on November 17, 2008. As a result of comments received, HUD revised the average cost pricing provisions (including a change of its term of reference to “average charge”) to provide more flexibility and greater clarity. In response to concerns about implementation in comments by some certain groups representing consumer interests, (who recommended that HUD limit charges for third party services to the actual cost of providing those services, plus an established rate of return), HUD indicated:

While HUD appreciates these comments, the proposed average cost pricing provision was not intended to limit the amounts charged for settlement services in this fashion, but instead simply provided for an alternative means of calculating and disclosing settlement charges on the HUD-1 or HUD-1A settlement statements. In order to avoid similar confusion about the intent of this provision in the future, the final rule uses the term “average charge” in place of “average cost pricing.” The term “average charge” appropriately focuses on the amount disclosed on the settlement statement, rather than the underlying costs of providing a particular settlement service.⁴

Widening the scope of usage, the Final Rule also clarified that an average charge may be used by any settlement service provider that itself obtains a settlement service from a third party on behalf of a borrower or seller, a change from the provision contained in the Proposed Rule limiting the provision to loan originators only:

HUD has determined that benefits to consumers and the benefits of reduced recordkeeping requirements and pricing flexibility from this provision should not be limited to one group of settlement service providers. Any provider that is able to calculate an average charge for a service in accordance with this provision and that is able to meet the provision’s recordkeeping requirements is permitted to use an average charge for that service.⁵

In addition to these clarifying changes, HUD made other changes to provide additional flexibility in calculating average charges. HUD determined that its objective of providing a method that benefits consumers and results in charges that are easily calculated, verified, and enforced is best served by restricting the actual charges imposed on borrowers and sellers rather than by prescribing a particular method for calculating those charges.

The Average Charge Provision

The Final Rule provides that an average charge⁶ may be used for any third party settlement service provided to a loan originator or another settlement service provider, so long as the total amounts received from borrowers for that service for a particular class of transactions, in the

² Federal Register, Volume 73, No. 222, Page 68233

³ Federal Register, Volume 73, No. 222, Page 68204

⁴ Federal Register, Volume 73, No. 222, Page 68234

⁵ Federal Register, Volume 73, No. 222, Page 68234

⁶ An average charge is the charge to the consumer in the transaction for a service. An average cost is the cost to the settlement service provider to provide that service.

aggregate, do not exceed the total amounts paid to the providers of that service for that class of transactions.

In order for a settlement service provider or loan originator to use average charge pricing, the provider must compute the average charge for a class of transactions based upon three criteria: the type of loan, the geographic area and a computation time period.

Type of Loan

A settlement service provider wishing to use average charge for third party settlement services must first determine the loan type to which the average charge will apply. HUD has permitted flexibility in this determination, allowing the provider to choose a singular loan type (i.e. purchase money, refinance, home equity, etc.) or all loan types handled by the provider.

Geographic Area

The settlement provider must also determine the geographic scope of the transactions to be included in the average charge. Again, the Final Rule has permitted flexibility in this determination, allowing the provider to choose a smaller geographic area (i.e. city or county) or a more expansive geographic area (nationwide).

Calculation Time Period

For the benefit of consumers and to maintain the accuracy of the average charge, the Final Rule requires that an average charge must be periodically recalculated. The settlement service provider may choose the frequency of recalculation so long as the recalculation occurs at least every six months and no more frequently than every month.

Requirements and Restrictions on Use of Average Charge

In order to prevent selective use of an average charge, the Final Rule provides that if an average charge is used in any class of transactions defined by the settlement service provider, then that provider must use the same average charge for every transaction within that class. However the settlement service provider defines a class (refinance or sale transactions), they must be consistent for the charges within that class.

The Final Rule also prohibits the use of average charges for settlement services where the charge is based on either the loan amount or the property's purchase price. HUD determined that the subsidization of higher priced transactions and loans by lower priced loans and transactions under such circumstance was not in the best interests of consumers. Average charges for items such as transfer taxes and all types of insurance, including mortgage insurance, title insurance, and hazard insurance are included in the prohibition.

Use of an average charge for a settlement provider's or loan originator's own charges are also prohibited under the Final Rule.

Lastly, the Final Rule requires a settlement service provider engaging in average charge pricing to maintain all records and documents used to calculate the average charge. These records must be retained for a period of at least three years after any settlement in which the average charge was used.

Benefits of Average Charge Pricing

Time Saved From Average Cost Pricing

Average charge pricing helps reduce costs that settlement service providers incur to keep itemized, customized cost accounting for each borrower. This not only saves costs for lenders in the newly-required GFE at origination of the loan, it also saves quality control and other costs afterwards. HUD believes that this could be the source of significant cost savings:

As explained above, there will be reductions in compliance costs from average cost pricing. It is estimated that the benefits of average cost pricing (e.g., reduction in the number of fees whose reported values must be those specifically incurred in each transaction) will lead to a reduction in originator costs of 0.5 percent, or \$210 million. No breakdown of fees is needed. No knowledge of an exact fee for each specific service needed for the loan is required for the GFE. In addition, no exact figure for the amount actually paid needs to be recorded for each loan and transmitted to the settlement agent for recording on the HUD- 1.⁷

Certainty of Closing Cost Items

The use of average charge pricing is particularly beneficial when such settlement services (i.e. recording fees) are not easily calculable at the origination of the transaction or the application for the loan.⁸ The availability of average charge pricing for such items allows consumers to obtain and rely on the charge quoted at the origination of the transaction as the charge they will incur at the closing.

Limited Adoption of Average Charge Pricing under the RESPA Rule

Problems with Regulatory Wording

Even though recognizing the significant benefits average charge pricing can accomplish for both providers and consumers, many settlement service providers are reticent to use such pricing in the face of one particular sentence in the regulation:

(2) Use of average charge. (i) The average charge for a settlement service shall be no more than the average amount paid for a settlement service by one settlement service provider to another settlement service provider on behalf of borrowers and sellers for a particular class of transactions involving federally related mortgage loans. The total amounts paid by borrowers and sellers for a settlement service based on the use of an average charge may not exceed the total amounts paid to the providers of that service for the particular class of transactions. (Emphasis added.)

As indicated above, average charges are computed using a base period in which actual charges for the settlement services are available. Those charges for the computation are then added together and divided by the number of transactions to achieve a computed average charge. It is this computed average charge which is used for the next, prospective period. The income and expense from average charge are intended to be revenue neutral for the settlement service provider.

However, many settlement service providers believe that the underlined portion of the regulation section above would require not only a computation of the average charge in accordance with the regulation, but also require an assurance that the total of all average charges made (from average charges computed on the basis of experience in a previous period) during the next, prospective period will equal the total actual amounts paid to the 3rd party provider during such period. Since the average charge used in the subsequent period is based on a previous period, and the actual expenses are prospective and unknown, a circumstance where the totals of average charges and actual payments are equal would be merely coincidental, if it ever occurred. Further, complying with this interpretation of the rule would require a re-examination of the charges made on an individual basis and making refunds to, or requests for additional funds from,

⁷ Federal Register, Volume 73, No. 222, Page 68287

⁸ The Final Rule requires a lender to issue a Good Faith Estimate (GFE) to a borrower shopping for a loan upon obtaining just six pieces of information. One item which a lender must “estimate” on the GFE issued is the recording charges likely to be incurred in the transaction. The Final Rule automatically places this number with other items which, in the aggregate, may not increase at closing by more than 10% over the number shown in the GFE, therefore putting a premium on accuracy.

consumers after the transactions closed in order to achieve this regulatory parity, a requirement significantly more onerous than using alternatives other than average charge.

HUD's Recognition of the Problem and the "FAQ Fix"

After being advised of the potential wording problem in its regulation on the use of average charge, HUD was encouraged to make a revision to the regulation allowing for more widespread use of average charge practices. Instead, HUD published an FAQ addressing the problem and its view of the resolution:

Q: If in using the average charge method of calculating and disclosing settlement charges, a settlement service provider charges borrowers and sellers (in the aggregate) too much for the settlement service, does the excess amount need to be refunded or is it permissible for the provider to keep the excess amount?

A. The excess amount does not need to be refunded, but it is not permissible to retain the excess amount. The excess may be applied to the next average charge period, for example. When such a procedure is followed, the average charge for the subsequent class of transactions must be adjusted, so that the sum of the previous excess amount and the total amount paid by the borrowers and sellers in the subsequent class does not exceed the total amount paid to the applicable settlement service providers.⁹

This answer has proved problematic to many settlement service providers for a number of reasons. First, the existing regulations contain no language allowing for the adjustment of a subsequent period average charge amount based upon an "excess" amount from a prior period. Secondly, although no mention is made in the FAQ, HUD subsequently expressed its belief on other occasions that this method of adjustment was only a one-way street: excess amounts must be used for adjustment, but not deficits, belying logic and leaving settlement providers to absorb only deficits in the calculation results. Further, HUD made clear that the FAQ's provided no regulatory stature for guidance.

HUD was also asked to consider addressing this issue as part of its "technical amendment" process; however, the technical amendments made by HUD did not address this issue.¹⁰

HUD's use of the terms "excess" and "too much" in the FAQ above mischaracterizes the concept of an average charge that is computed with existing data to obtain an average charge for prospective use. We believe the principal reason for including a set of qualifications for the determination and use of an average charge was to create the most accurate prognostication of the future expense. To also require a retrospective "true-up" of the average charge calculation places unreasonable burdens on its use and has contributed to its limited adoption.

Suggested Regulatory Amendments

CFPB should amend the RESPA rule previously adopted by HUD to make the attached, relatively minor adjustments to the current wording governing average charge. The amended wording will foster certainty that the use of an average charge, computed as required by the regulatory requirements using existing data is permissible, regardless of whether excesses or deficiencies are computed prospectively between average charge and actual expense totals. This wording will benefit industry and consumers by providing certainty to the calculation process and foster the increased use of such charges. The result is reduced costs for settlement service providers and more certainty for consumers that they are not being overcharged for third-party fees.

⁹ New RESPA Rule FAQs (updated thru April 2, 2010), Department of Housing and Urban Development, page 40.

¹⁰ Federal Register, Volume 76, No. 132, page 40612 (Real Estate Settlement Procedures Act (RESPA): Technical Corrections and Clarifying Amendments) July 11, 2011.

Suggested revisions to average charge regulation:

- (2) *Use of average charge.* (i) The average charge for a settlement service shall be no more than the average amount paid for a settlement service by one settlement service provider to another settlement service provider on behalf of borrowers and sellers for a particular class of transactions involving federally related mortgage loans. The amount paid by a borrower or seller for a settlement service based on the use of an average charge may not exceed the amount calculated in paragraph (b)(2)(ii) for the particular class of transactions using such settlement service.
- (ii) The settlement service provider shall define the particular class of transactions for purposes of calculating the average charge as all transactions involving federally related mortgage loans for:
- (A) A period of time as determined by the settlement service provider, but not less than 30 calendar days and not more than 3 months;
- (B) A geographic area as determined by the settlement service provider; and
- (C) A type of loan as determined by the settlement service provider.
- (iii) A settlement service provider may use an average charge in the same class of transactions for which the charge was calculated. If the settlement service provider uses the average charge for any transaction in the class, the settlement service provider must use the same average charge in every transaction within that class for which a GFE was provided.
- (iv) The use of an average charge is not permitted for any settlement service if the charge for the service is based on the loan amount or property value. For example, an average charge may not be used for transfer taxes, interest charges, reserves or escrow, or any type of insurance, including mortgage insurance, title insurance, or hazard insurance.
- (v) The settlement service provider must retain all documentation used to calculate the average charge for a particular class of transactions for at least 3 years after any settlement for which that average charge was used.
- (c) *Violations of section 4 of RESPA (12 U.S.C. 2604).* A violation of any of the requirements of this section will be deemed to be a violation of section 4 of RESPA. An inadvertent or technical error in completing the HUD-1 or HUD-1A shall not be deemed a violation of section 4 of RESPA if a revised HUD-1 or HUD-1A is provided in accordance with the requirements of this section within 30 calendar days after settlement.